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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

FRANCIS G. A. O'NEILL,
Petitioner,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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OPINION BY COURT BELOW.

Petitioner, Francis G. A. O'Neill, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit to review the judgment and decision of that court in case number 11,770, entitled Baltimore and Ohio Railroad Company v. Francis G. A. O'Neill,

opinion dated March 2, 1954 (R., 300-310), reported in ... Fed. (2d), ...

The judgment of the Court of Appeals reversed the judgment of the Federal District Court for the Southern District of Ohio and remanded the cause for a new trial. The judgment of the District Court overruling respondent's motion for new trial and in favor of petitioner was entered without opinion. (R., 282.)

JURISDICTION OF THIS COURT.

The judgment of the United States Court of Appeals for the Sixth Circuit of which review is sought was dated and filed March 2, 1954. (R., 299.)

Jurisdiction to review that judgment by writ of certiorari is conferred on this court by the provisions of the Act of June 25, 1948, c. 646, 62 Stat., 928; U. S. C., Title 28, Section 1254(1), which provides:

> "Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods:
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

QUESTIONS PRESENTED FOR REVIEW.

1. In an action under the Federal Employers' Liability Act where the uncontroverted evidence shows that a heavy ash pan was hoisted by a manual jack operated by another employee of respondent and that the ash pan fell and struck petitioner, a boilermaker, because a bolt supplied from respondent's stock bin suddenly and without explanation broke, was the District Court correct in submitting the case to the jury on a permissible inference of defendant's negligence under **res ipsa loquitur?**

2. Did the Court of Appeals for the Sixth Circuit correctly hold that although the evidence reasonably supported an inference of negligence on the part of respondent, such inference was **rebutted as a matter of law** by evidence that petitioner selected two new bolts from respondent's stock bin and that respondent customarily purchased such bolts from another company?

3. May X-ray reports, made by specialists to respondent's doctor and at his request and incorporated into the records of a hospital, be admitted into evidence on cross examination of that doctor under the provisions of Section 1732, Title 28, U. S. C.?

4. When such X-ray reports are admitted into evidence on cross examination of respondent's doctor to show the basis for the doctor's previously stated opinion on direct examination and are limited by the court to that purpose, was error prejudicial to the respondent committed when the court later commented on those reports to the jury?

STATUTES INVOLVED.

The questions presented for review in this case involve two statutes passed by Congress.

The pertinent statute in the Federal Employers' Liability Act involved in this appeal is Title 45, U. S. C., Section 51, which provides:

> "Every common carrier by railroad while engaging in commerce between any of the several states or Territories or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and

children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee; for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier as entitled to the benefits of this chapter." Apr. 22, 1908, c. 149, Section 1, 35 Stat., 65; August 11, 1939, c. 685, Sect. 1, 53 Stat., 1404.

Question number three involves the following statute, Title 28, U. S. C., Section 1732, and the portion pertinent to this review provides:

"(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of such business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing of record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term 'business', as used in this section, includes business, profession, occupation, and calling of every kind. * * *" June 25, 1948, C. 646, 62 Statute, 945, as amended August 28, 1951, C. 351, Sections 1, 3, 65 Statute, 206.

STATEMENT OF THE CASE.

Petitioner, plaintiff below, filed an action against the respondent railroad, defendant below, in the Federal District Court for the Southern District of Ohio. The basis for that court's jurisdiction was that petitioner and respondent were engaged in interstate commerce and the furtherance thereof at the time of petitioner's injuries. The provisions of the Federal Employers' Liability Act (Title 45, U. S. C., Sections 51 and following) were, therefore, invoked.

At the trial the evidence pertinent to questions presented in this petition was uncontroverted. On the day of the accident petitioner, employed as a boilermaker, was assigned to install a heavy ash pan into a locomotive of respondent. (R., 24.) Petitioner accordingly went to respondent's supply room and picked out among other things two half-inch bolts of the usual type and size for performing the job in question. (R., 26, 66.) After burning holes in the sides of the ash pan, petitioner and his helper, Jaynes, fastened a chain onto each side of the ash pan and across the interior and secured the ends of the chain to the sides with bolts, nuts and washers. (R., 27, 28.) The ash pan was then placed into position in the pit underneath the locomotive. (R., 28, 29.) A hook connected to a pull jack was then hooked onto the chain extending from side to side of the ash pan. The helper, Jaynes, in the firebox above manually operated the jack hoisting the ash pan, while petitioner in the pit below steadied and guided the ash pan until it was hoisted to the position where it was to be inserted into the engine. (R., 31-33.)

While the ash pan was suspended, one of the bolts broke and the right side of the ash pan fell, striking petitioner and wedging him between the pan and the frame of the locomotive. (R., 33-34.) The broken bolt was later shown to petitioner by respondent's master mechanic in the latter's office. (R., 66.) At the time the pan was raised, the petitioner could not see his helper, Jaynes, who was manually operating the jack in the firebox. (R., 48.)

Respondent did not produce the broken bolt at the trial, but respondent's witness, Kessler, testified that a bolt of like size and type as the one which had broken had a tensile strength of 66,000 pounds per square inch. (R., 121.)

On cross examination petitioner testified that he had selected two new half-inch bolts for the job. (R., 54.) Respondent's witness, Kessler, testified that the practice of respondent is to purchase bolts and nuts from another company. (R., 116.) Respondent offered **no** evidence to explain why the bolt broke.

It was undisputed that at the time of the trial petitioner was suffering from a compression fracture of one of his vertebrae. The factual issue was whether the accident in question caused the fracture. Respondent's witness, Dr. Ralph Pickett, testified on direct examination as follows (R., 129):

> "Q. You say that you took X-rays? A. I had them taken at the hospital.
>
> Q. Now, what, if anything, did you find as a result of those X-rays? A. Both of my own personal study of the X-rays and **from the report of the X-ray specialists**, we found that there were no broken ribs, but there was an old compression of the eighth dorsal vertebra.
>
> The Court: There was a what?
>
> The Witness: An old compression of the eighth dorsal vertebra." (Emphasis supplied.)

On cross examination X-ray reports, made by Dr. Erhard and Dr. Piatt to Dr. Pickett at the latter's request and incorporated as part of the Newark City Hospital records, were admitted into evidence. (Pl. Ex. 4; R., 264, 157) (Pl. Ex. 5; R., 265, 160.) These reports according to Dr. Pickett's own foregoing testimony constituted at least in part the basis for Dr. Picket's opinion which he expressed on direct examination. The court, at the time these exhibits were admitted, limited the admission for the purpose of showing the information that Dr. Pickett had from these specialists. (R., 158.) A reference to those reports indicate that they are somewhat contradictory to Dr. Pickett's previously expressed opinion that the compression fracture was "old".

The court submitted the cause to the jury under the doctrine of **res ipsa loquitur**. (R., 234, 235.) The jury returned a verdict for petitioner for $32,000.00. (R., 266.) The District Court overruled the respondent's motion for a directed verdict and granted the motion for a new trial unless petitioner agreed to a remittitur to $22,000.00. (R., 281.) Petitioner did agree to such a remittitur (R., 282) and judgment thereon was entered on September 8, 1952. (R., 282.)

On appeal the United States Court of Appeals for the Sixth Circuit held that a permissible inference of a defective bolt due to respondent's negligence was reasonably supported by the evidence. (R., 303.) The court further held, however, that such inference was rebutted by the facts that the bolt was a new bolt selected by petitioner and that it was not manufactured by respondent but purchased by respondent from another company. (R., 304, 305.) The Court of Appeals also held that the reports on the X-rays (Plaintiff's Exhibits 4 and 5) were not admissible as en-

tries in the regular course of business under Section 1732, Title 28, U. S. C. (R., 306.) The court further held that prejudicial error was committed by the District Court in commenting on these reports in its charge to the jury, even though the court had properly limited the use of the reports at the time that they were admitted into evidence. (R., 307.) The judgment of the Court of Appeals reversed the judgment of the District Court and remanded the cause for a new trial. (R., 299.)

ARGUMENT.

Summary.

This is an action arising under the Federal Employers' Liability Act (Title 45, U. S. C., Sections 51 and following), but the issues transcend that Act.

Two members of the Court of Appeals for the Sixth Circuit have upset a verdict and judgment for petitioner. The District Court and all three members of the Court of Appeals agreed that an inference of negilgence was raised by the evidence in this case under **res ipsa loquitur**. A majority of the Court of Appeals held that such inference has been rebutted as a matter of law. This holding was erroneous for the first reason that respondent offered **no** evidence in explanation of why the bolt broke. Secondly, the court resorted to cases involving liability of manufacturer and retailer to a purchaser which have no bearing on this case. Certainly, respondent's statutory and common law duty to its employee did not cease because the bolt was new or because it was purchased from another company. The final and most serious error in the court's reasoning on **res ipsa loquitur** was that the **court** was substituted for the **jury** to determine whether an inference of **fact** had been rebutted. This rationale directly conflicts with the principles announced by this court and federal circuit courts in decisions on **res ipsa loquitur** and in numerous cases arising under the Federal Employers' Liability Act. That holding was a usurpation by the court of the jury's province. The practical effect of that holding, if permitted to stand, will seriously erode, if not completely wipe out, the principle of **res ipsa loquitur** in the Sixth Circuit. This error on **res ipsa loquitur** reaches beyond actions by railroaders.

It involves a misconception of the respective functions of judge and jury. This error alone furnishes ample reason to grant certiorari and to review and reverse the decision of the Court of Appeals for the Sixth Circuit.

An important error in the admissibility of evidence was also committed by the Court of Appeals. X-ray reports duly incorporated into the records of a hospital concerning the patient have been held inadmissible in the face of the plain meaning of the pertinent statute. Title 28, U. S. C., Section 1732. The error is particularly apparent in this case, since those reports were made to the very doctor in whose cross examination they were admitted. The reports were, therefore, completely reliable, and there was no doubt but that they had been entered into the hospital records in the regular course of the business of the hospital. It is apparent that the decision in **Palmer v. Hoffman**, 318 U. S., 109, was misinterpreted. It is also clear that the decision of the Sixth Circuit Court of Appeals was in conflict with decisions in other federal circuits. (R., 306.)

Finally, the court's comment to the jury on the reports was not prejudicial to respondent. Those reports were admissible at any event on cross examination of respondent's doctor. Their use was limited at the time. The jury had the right to see and read those reports, and the comment by the court should not upset a verdict which was supported by other evidence on the factual issue of injury to petitioner.

Questions 1 and 2.

These questions will be considered together. To avoid a long and cumbersome single question, we have separated the two considerations—the applicability of **res ipsa loquitur** and the claimed rebuttal of the inference. Ac-

tually, the second intertwines with the first, and the error of reasoning by the Court of Appeals for the Sixth Circuit permeates both.

The Court of Appeals for the Sixth Circuit has upset a verdict and judgment for petitioner by turning the judicial clock back to two early decisions in the Sixth Circuit. That Court correctly held in this case that the evidence under the doctrine of **res ipsa loquitur** would support an inference by the jury that the bolt broke due to respondent's negligence (R., 303), with the direct result that petitioner, a railroader, was struck by a heavy ash pan and seriously injured. In this holding all three judges concurred, along with the judge in the District Court. Two of the three judges of the Court of Appeals, however, then completely destroyed the effect of the inference by holding that **as a matter of law** the inference had been rebutted. (R., 304, 305.) The District Court according to the majority of the Court of Appeals should have directed a verdict for respondent. (R., 305.)

This holding is in direct conflict with the definition of and principles governing the application of **res ipsa loquitur** announced by this court in the decisions in **Sweeney v. Erving**, 228 U. S., 233; **Jesionowski v. Boston & Maine Railroad Company**, 329 U. S., 452; and **Johnson v. United States**, 333 U. S., 46. The holding by the Sixth Circuit also conflicts with decisions in other circuits. **Atchison, Topeka & Santa Fe Railway Company v. Simmons**, 153 Fed. (2d), 206 (C. C. A., 10); **Terminal Railroad Association of St. Louis v. Staengel**, 122 Fed. (2d), 271 (C. C. A. 8).

In referring to the decision of this court in **Sweeney v. Erving**, 228 U. S., 233, supra, the Court of Appeals in its opinion (R., 303, 304) omitted the very heart of the doctrine

of **res ipsa loquitur**, namely "that they (the facts) make a case to be decided by the jury." A **complete** quotation of the definition found in **Sweeney v. Erving** is (p. 240 of the opinion):

> "In our opinion, res ipsa loquitur means that **the facts of the occurrence warrant the inference of negligence**, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; **that they make a case to be decided by the jury**, not that they forestall the verdict. Res ipsa loquitur, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the **jury** is whether the preponderance is with the plaintiff." (Emphasis supplied.)

The Court of Appeals for the Sixth Circuit confused what constitutes sufficient evidence "to make a case for the jury" with the burden of proof. The decision in **Sweeney v. Erving** was that the permissible inference of negligence under **res ipsa loquitur** does not shift the burden of proof. Of course not! That inference does, however, make a case for the jury. Indeed in **Sweeney v. Erving** the lower court **did** submit the case to the jury and a verdict for defendant resulted. It was plaintiff's contention in that case that the lower court erred in failing to charge that the burden of proof shifted to the defendant. The court held that the burden did not shift. The Court of Appeals, therefore, misinterpreted the **Sweeney v. Erving** rationale and disregarded the most important effect of **res ipsa loquitur.**

The Court of Appeals' decision in this case also conflicts with the principles laid down in the decisions in **Johnson v. United States**, 333 U. S., 46, supra; and **Jesionowski v.**

Boston & Maine Railroad Company, 329 U. S., 452, supra. In this case the essence of the uncontroverted evidence is that a bolt supplied by respondent broke without explanation and permitted an ash pan to fall and strike petitioner. (R., 33, 34.) Under the facts and holding in **Johnson v. United States**, supra, and the holding in **Jesionowski v. Boston & Maine Railroad Company**, supra, a permissible inference of defendant's negligence clearly made a case for the jury. As this court stated in the **Jesionowski** opinion at page 457:

> "* * * Thus the question here really is not whether the application of the rule relied on fits squarely into some judicial definition, rigidly construed, but whether the circumstances were such as to justify a finding that this derailment was a result of the defendant's negligence."

Contrast the strong explanatory evidence in the **Jesionowski** case with the so-called explanatory evidence in this case. In the former there was strong evidence that the decedent's own negligence caused the derailment. In this case **no** explanation for the breaking of the bolt was offered by respondent. The bolt itself was not produced at the trial by respondent. Yet the Court of Appeals held that because the pertinent bolt was a new bolt (R., 54) and because respondent's "practice" was to purchase bolts from another company (R., 116), the inference was overcome, and the "explanatory facts" established "non-liability as a matter of law." (R., 304, 305.)

To support this judicial usurpation of the jury's province the court cited cases dealing with the liability of a purchaser from a manufacturer to a third party. (R., 305.) To put it most kindly, this was certainly a strained analogy. Those cases dealt with state law and a duty owed by a

retailer to a purchaser. Here we are dealing with a federal statutory and common law duty owed by an employer to his employee. That duty included, among other things, the use of reasonable care to provide the petitioner with a safe place to work and safe equipment and parts. Congress did not carve an exception from that duty to exclude new parts or parts purchased from others. The novel proposition advanced by two of the members of the Court of Appeals seems to be that the railroad's duty ceased because the bolt was new and purchased from another company.

To support the conclusion that the District Court should have directed a verdict for respondent, two members of the Court of Appeals resorted principally to two early decisions in the Sixth Circuit. **Shankweiler v. Baltimore and Ohio Railroad Company,** 148 Fed., 195 (C. C. A. 6); and **Southern Railway Company v. Derr,** 240 Fed., 73 (C. C. A. 6). (R., 305.) Those decisions do not represent the law today. Even so the **Shankweiler** case, involving early Ohio law, is exactly the reverse of this case on the explanatory evidence offered. In that case the railroad **did** produce evidence to show why the pertinent part (a brake rod) broke. The defect was shown, but it was also shown that the defect was concealed. Even further, there was evidence to show that an inspection of that very part had been made a short time prior to the accident. (Opinion, pp. 195, 196.) The contrast between such explanatory evidence and the utter lack of any such evidence in this case is obvious.

Aside from the foregoing, the decisions of this court hold that a permissible inference of negligence under **res ipsa loquitur** means that the **jury** may accept or reject the explanation. To hold that a **court** may accept the explanation and reject an inference of **fact** is a clear invasion by the

court of the province reserved for the jury. The acceptance or rejection of factual inferences has been held time and time again by this court to be the exclusive function of the jury. In the opinion in **Johnson v. United States**, 333 U. S., 46, this court stated:

> "No act need be explicable only in terms of negligence in order for the rule of res ipsa loquitur to be invoked. The rule deals only with permissible inferences from unexplained events."

The same principle is found in the opinion in the decision in **Jesionowski v. Boston & Maine Railroad Co.**, 329 U. S., 452, supra. See also **Lavender v. Kurn**, 327 U. S., 645.

In an analogous decision involving a carrier's liability to an injured passenger, this court held in the case of **Gleeson v. Virginia Railroad Company**, 140 U. S., 435, at p. 444:

> "The law is that the plaintiff must show negligence in the defendant. This is done prima facie by showing if the plaintiff be a passenger, that the accident occurred. If that accident was in fact the result of causes beyond the defendant's responsibility or of the Act of God, it is still none the less true that the plaintiff has made out his prima facie case. When he proves the occurrence of the accident, the defendant must answer that case from all the circumstances of exculpation, whether disclosed by the one party or the other. They are its matter of defense. **And it is for the jury to say in the light of all the testimony, and under the instructions of the court, whether the relation of cause and effect did exist, as claimed by the defense, between the accident and the alleged exonerating circumstances.**" (Emphasis supplied.)

Federal law, of course, governs in this case. The later Ohio decisions on **res ipsa loquitur** have adopted the principles set forth by this court in **Sweeney v. Erving**, supra. The reasoning expressed by the Ohio Supreme Court in

the case of **Fink v. N. Y. C. R. Co.**, 144 Oh. St., 1, is, therefore, pertinent. In that case plaintiff offered evidence of a derailment. Defendant's explanatory evidence was that a stalled car on the tracks caused the derailment. The court held that whether the explanation overcame the inference was a question of **fact** for the jury. The reasoning of the court is found at p. 10:

> "It would be a strange doctrine to say that in a jury trial the court is not permitted to draw the inference of negligence in a case which calls for the application of the rule and then to say that the court could determine as a matter of law that the inference had been rebutted or destroyed by an explanation offered by the defendant, of the circumstances of the occurrence."

The majority of the Court of Appeals not only rebutted an inference of **fact** by their own finding, but indulged in some inferences of their own in so doing. There is no evidence of why the bolt broke or of notice on the part of the respondent one way or the other. Yet the court **infers** that respondent had no notice of any defect. (R., 304.) This merely illustrates the basic error—the court's invasion into the jury's province of fact-finding.

It is of small comfort to petitioner that the cause has been remanded for a new trial. The proof called for in the opinion of the Court of Appeals (R., 304, 305) is in the possession of and within the exclusive knowledge of respondent. It will be difficult, if not impossible, for petitioner to enlarge on his proof in the event of a new trial. Respondent with its vast array of expert talent has complete control of the specific proof. Indeed, the situation in this case is a striking illustration of the reason and justice in the principles of **res ipsa loquitur**. We do not want our position to be misunderstood. That position is that the decision of the Court of Appeals permitting a court to rebut

an inference of fact by a ruling of so-called law in practical effect removes **res ipsa loquitur** from the Sixth Circuit. An important part of the right to have a jury decide the ultimate facts has been denied petitioner.

This error should by all means be corrected by this court.

Question 3.

X-ray reports were made to respondent's doctor and incorporated into the records of Newark City Hospital. (Pl. Ex. 4; R., 264, 157) (Pl. Ex. 5; R., 265, 160.) On the stand that doctor gave an opinion at least in part at variance with the data in those reports. (R., 129.) On cross examination the reports were admitted and limited by the court.

Irrespective of later comment by the court, these reports were admissible as proof of their contents under Section 1732, Title 28, U. S. C.

The decision in **Palmer v. Hoffman**, 318 U. S., 109, has been misinterpreted by the Court of Appeals. In the **Hoffman** decision the basis for excluding an accident report made to a railroad was that such a report was not in furtherance of the business of the railroad as such, but rather in the furtherance of litigation (p. 114 of the opinion). No such objection exists in this case. The X-ray reports were without doubt incorporated into the hospital records relating to treatment of petitioner in the regular course of the business of the hospital, namely, the treatment of patients.

The conclusions expressed in those reports are actually statements of interpretation of the films. The reports, therefore, are quite different from those excluded in the decisions cited in the opinion of the Court of Appeals. (R., 306.)

In any event the decision on this point directly conflicts with the decisions in **Korte v. New York, New Haven and New Hampshire R. Co.**, 191 Fed. (2d), 86 (C. C. A. 2), cert. denied, 342 U. S., 868; **Landon v. United States**, 197 Fed. (2d), 128 (C. C. A. 2); and **Moran v. Pittsburgh-Des Moines Steel Co.**, 183 Fed. (2d), 467 (C. C. A. 3).

Question 4.

Under any rule of evidence the only error committed with respect to the X-ray reports came when the court commented to the jury on their contents. These reports were sent into the jury deliberating room. The jurors undoubtedly read them. Those reports spoke for themselves; their contents contradicted Dr. Pickett. All of this would be completely proper since they were properly admitted and limited (under any rule of evidence) on cross examination. It is obvious that the remarks of the court were not prejudicial. Petitioner performed hard work up to the time of the accident. (R., 21.) This and other uncontroverted evidence (for example, his inability to work after the accident), amply supported the jury's obvious finding that the fall of the pan did cause petitioner's undisputed disability.

CONCLUSION.

The Court of Appeals for the Sixth Circuit by a majority holding has committed serious error in its decision on **res ipsa loquitur**. The practical effect of that holding is to wipe out the doctrine in the Sixth Circuit.

Also serious is the Court of Appeals' misinterpretation of **Palmer v. Hoffman**, supra, as applied to the admissibility of records under Section 1732, Title 28, U. S. C.

In view of these errors this court should grant writ of certiorari to review the decision of the Court of Appeals.

The judgment of the Court of Appeals should be reversed and final judgment for petitioner should be ordered in accordance with the judgment of the District Court.

Respectfully submitted,

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